EUROPEAN PERSPECTIVES ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

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Access to environmental justice is a crucial issue in the implementation of environmental policies and the enforcement of environmental laws and thus the protection of the environment. Indeed, without enforcement, environmental law would be "toothless" in the sense that a strong link would be missing in the regulatory chain, i.e. the whole process through which legislation is designed, conceived, drafted – to express the environmental policy objectives – adopted, implemented – transposed and applied in practice – and enforced until its efficiency is assessed and the legislation is possibly reviewed.

This methodological tool allowing for a holistic approach is relevant both at the EC and the national level. The European Commission is using it in its 1996 Communication on Implementing EC Environmental Law1 where enforcement, including access to justice, is given particular attention.

The access to justice issue within the EC legal order has two levels: The EC level and the Member State level. This is due to the fact that the implementation of EC environmental law is a "shared responsibility," on the one hand between the EC and the Member States and, on the other, within a given Member State between the relevant levels – central/regional/local – and amongst them. This division of tasks is expressed in the EC Treaty where Article 175 paragraph 3, second sentence foresees that "without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environmental policy". It is also referred to in the 5th Environmental Action Programme2 as recently reviewed.3

Besides these shared responsibility considerations specific to the environment, the characteristic feature of EC law in general is that the normal judge entitled to apply it is the national judge, through the courts and tribunals of the Member State. The national judge has the general competence, whereas the European Court of Justice (ECJ) has attribution competencies, which are reserved to it under the EC Treaty.

The EC level

At the EU level, there is no environmental court as such. The ECJ, within its attributed competencies, may consider environmental cases and, therefore, also act as an environmental court. This is done either within the framework of Article 226 (formerly Article 169) of the EC Treaty in declaratory judgements on failures of the Member States to comply with EC environmental law, mostly directives, or of Article 230 (formerly Article 173) of the EC Treaty in reviews of the legality of EC binding acts, mainly directives, for example for not having used the appropriate legal basis (Articles 175 or 95 or possibly 133) and last, but not least, within the framework of Article 234 (formerly Article 177) of the EC Treaty in preliminary rulings on the interpretation of the Treaty or secondary environmental legislation.

Access to the ECJ is not open to the general public, but to the so-called "privileged" plaintiffs, which include, in Article 226 cases the Commission or a Member State, in Article 230 cases the EU Institutions and/or Member State and under certain conditions – if they are the addressees or if they are directly and individually concerned – any natural or legal person.

The limited scope of this provision as regards the *locus standi* of the general public was made clear in the Greenpeace case (C-321/95P, 2.4.1998, ECR [1998] I-1651) where this NGO brought an action for annulment to the Court of First Instance (CFI) and subsequently in an appeal to the ECJ against a decision of the Commission to co-finance a project on the Canary Islands. The Court stated that the aforementioned condition on the locus standi of non-privileged plaintiffs was not fulfilled and, therefore, rejected the application as non-admissible. As a result of this judgement, environmental NGOs have argued that the EC Treaty (Article 230) should be amended to include amongst the privileged plaintiffs environmental NGOs, which would thus have *ipso jure* a *locus standi*.

This request was made stronger after the signature by the EC and all the Member States of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.4 The Convention also covers the EC Institutions alongside national public authorities. It therefore refers to the EC level and to that of the MS both of which have to incorporate its requirements as regards the two levels, since the EC intends to ratify this Convention. Therefore, the so called third pillar of Aarhus – access to justice – would require the introduction at the EC level of locus standi, at least for NGOs, before the CFI, within the framework of Article 230 of the EC Treaty. Such an amendment of the Treaty would only be possible in the context of an Intergovernmental Conference (IGC) for reviewing the Treaties. This is, however, not foreseen in the context of the present IGC, which was expected to be completed at the Nice European Council, in December 2000. In any event, the EC made a statement when signing the Aarhus Convention according to which it would consider making a reservation upon ratification for certain issues with regard to the EC Institutions alone, such as access to justice before the ECJ. It remains to be seen if the next IGC, in the light of developments on the implementation of the Aarhus Convention will follow up on this issue, so that a new provision in Article 230 of the EC Treaty could, for example, foresee locus standi being created for environmental – and possibly health and consumer protection – NGOs fulfilling certain objective and qualitative criteria to be established at the EC level. Meanwhile, it would be interesting to discover whether

the ECJ's judgement in the Greenpeace case would extend to a case where the interested NGO has participated in public consultation under the EIA Directive (85/337/EEC as amended by 97/11/EC5). In other words, in such a case, would locus standi be recognised by a broadening of the interpretation of the "directly and individually concerned"?

The environmental cases which have been brought to the CFI to date and the ECJ tackle a great variety of legal issues, which are often very complex and technical and normally require technical assistance, which the Commission often brings to the Court through officials of DG Environment who accompany the Agent of the Commission in the oral procedure or through written submissions on questions raised by the Judge Rapporteur.

The Court does not have specialised chambers to deal with issues such as environmental enforcement on a sectional basis, although for trademarks there is a de facto one in the CFI. The possibility to appoint experts foreseen in the internal rules – reglement de procedure – of the Court is rarely used. However, in the current practice of the ECJ, there is a de facto "specialisation" of the Advocates General who share between them the environment cases according to the sector concerned – waste, nature, etc.

The Member States level

The issue of access to justice on environmental matters within the Member States raises the following key considerations:

- Is this an issue of EC competence or of national competence alone?
- If the EC were to intervene, how far could it go and what instrument – legally binding or soft law – could it propose?
- Is there a need for a multilateral international instrument under public international law and how would the two previous questions be reflected in such an instrument?

The first two questions refer to the subsidiary and proportionality principles. The third question refers to the Aarhus Convention and raises issues concerning the implementation of its third pillar at the EC level and Member State level. All three questions were addressed both in the Commission's 1996 Communication and in the Commission's follow-up to the Aarhus Convention.

The 1996 Communication

The 1996 Communication devotes paragraphs 36-43 to the access to justice issue and its importance. Paragraph 41 is of particular relevance for the issue of environmental courts. It reads as follows: "Access to MS courts would have the desirable effect of channelling litigation on the enforcement of EC environmental law to the most appropriate level, i.e. regional and national. The use of courts within the MS for the enforcement of Community environmental measures is desirable for various reasons. One is that there is no possibility that the resources in time and personnel which are available to the Commission and the ECJ will ever be sufficient for, not even the majority of, environmental cases arising in all MS to be dealt with through direct actions brought by the Commission in the ECJ. In addition, the courts of the MS are better placed than the ECJ to take into account during the proceedings the particular legal, administrative and environmental context of the environmental measure as it applies in each MS, and to get a clearer picture of the facts through the evidence of witnesses and the appointment of experts. Moreover they are better placed to grant interim measures which are an extremely useful instrument for preventing damage to the environment."

The Communication does not suggest that environmental courts be created, although the paragraph quoted above gives arguments in favour of such an option. Subsidiary considerations would argue against such a proposal at the EC level and in favour of leaving this to the good will of the individual Member States. The Communication, rather, favours (paragraph 43) the option of a more limited scope of access to justice, in terms of its beneficiaries, namely environmental NGOs. The idea would be that NGOs recognised by MS are given the necessary *locus standi* to bring judicial review actions against public authorities in the MS. A first step in this direction could be a recommendation encouraging MS to broaden access to justice for NGOs. This soft law approach refers to a general access to justice instrument, namely a Council Recommendation, based on the former Article 130 S (now Article 175) of the EC Treaty, which is a formal act of the Council, although non-binding.

A sector-wise approach had been previously followed in Council Directive 90/313/EEC on the freedom of access to information on the environment,[6] which stipulates in Article 4 that Member States have an obligation to provide for access to justice in their implementing legislation for the purposes of facilitating public enforcement of the Directive. A more extensive provision on access to justice has been introduced in the proposal for a new directive on access to information repealing Directive 90/313, adopted by the Commission on June 29, 2000, with a view to aligning the existing directive to the Aarhus provisions on access to information and going beyond it in the light of the experience gained with the application of the 90/313 Directive. Furthermore, access to justice provisions will also be introduced in the forthcoming draft Directive on environmental liability, to be adopted by the Commission in 2001 as a follow-up to the Commission's White Paper adopted in February 2000. The 1996 Communication was anterior to the adoption of the Aarhus Convention in 1998, the latter being more ambitious with regard to access to justice.

The Aarhus Convention

The Aarhus Convention stresses in its recitals that "effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced." Article 1 stipulates that "each Party shall guarantee the rights of…access to

justice in environmental matters in accordance with the provisions of this Convention."

Under the definitions in Article 2, the "public concerned," i.e. benefiting from the provisions of the Convention, refers to the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Thus NGOs meeting these requirements benefit *ipso jure* from the rights granted by the Convention. Article 9 refers to access to justice – third pillar of Aarhus. It foresees, in paragraph 1, access to justice linked to access to information and, in paragraph 2, access to justice linked to public participation in decisions on specific activities referred to in Article 6. Furthermore, in paragraph 3 of Article 9, there is a general provision according to which "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." This therefore also covers EC legislation as far as the Member States are concerned.

With regard to the second pillar of Aarhus – covering public participation – the Commission is preparing a proposal for a "package" instrument, namely a directive based on Article 175 of the EC Treaty, to introduce the public participation requirements into the decision-making process foreseen in certain important directives, such as the EIA, the IPPC7 and the Urban Waste Water Treatment8 Directives, and by way of a cross-reference to certain other directives referring to plans and programmes. Access to justice provisions will be foreseen to ensure the public's participation rights.

With regard to Article 9, paragraph 3, the Commission will consider, in 2001, the idea of a Directive on access to justice for the remaining – uncovered by other directives – issues, including access to justice linked to public participation concerning plans, programmes and policies referred to in Article 7. The purpose is to align existing EC legislation to the Aarhus requirements with a view to enabling the EC to ratify this Convention, which will subsequently become part of the "acquis communautaire," binding both for the EC and the Member States.

The Aarhus Convention does not refer to the possible establishment of environmental courts, leaving this to the discretion of the Parties. Instead, it refers to the range of remedies and procedures. For access to justice purposes, it only uses the expression "court of law or another independent and impartial body established by law" to be defined within the legal orders of the Parties. The issue of the environmental courts is, therefore, left open along with other issues on which implementing practices have to be established within the context of the Aarhus Convention reflecting the best practices of the Member States, but also of other Parties where such practices exist.

Final remarks

Access to justice is an issue of growing interest. There is a strong international trend but also willingness at the EC level and within certain Member States to further improve access to justice in environmental matters. Issues such as the *locus standi* of environmental NGOs and of the public concerned remain to be defined in accordance with the best practices to be developed at the EU level, but also within the framework of Aarhus. This is also true for the legal remedies on the substance of the cases and the injunctive relief, which both have to be "fair, equitable, timely and not prohibitively expensive" (Article 9, paragraph 4 of Aarhus).

The preparation of the 6th Environmental Action Programme could be an opportunity to address some of the aforementioned issues in a co-decision frame,[9] where the European Parliament is expected to request more public participation and access to justice. In this evolving context, the idea of creating environmental courts becomes very attractive and challenging in the sense that it may facilitate access to justice in general, make it more effective and foster the improved application of the available instruments at international, EC and national level. Best practices could be developed in this direction.

References

1. COM (1996) 500 final, 22.10.1996
2. COM (1992) 23, Resolution of the Council 1.2.93, OJ no C138, 17.5.93
3. Decision no 2179/98/EC of the Council and the EP of 24.9.1998, OJ no L 275, 10-10-98, p.1
4. Signed June 25, 1998; up to now by thirty eight contracting States including the fifteen MS and the EC
5. OJ no L 175, 5-7-1985, p.40; OJ no L 73, 14-3-1997, p.5
6. OJ no L 158/56, 23-6-1990
7. Directive 96/61/EC, 24-9-1996: OJ no L 257, 10-10-1996, p.26
8. Directive 91/271/EEC, 21-5-1991: OJ no L 135, 30-5-1991, p.40
9. The legal basis for this is foreseen in Article 175(3) of the EC Treaty

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